NO. 92-1744

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1993

WOOD COUNTY, TEXAS,
SHERIFF FRANK WHITE,
DEPUTY JAMES ROBERTS
*Petitioners*

versus

LARRY PEMBROKE, ET AL
*Respondents*

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Charles H. Clark
P.O. Box 98
604 Woldert
Tyler, Texas 75710
903/593-2514
State Bar No. 04274000
ATTORNEY FOR PETITIONERS

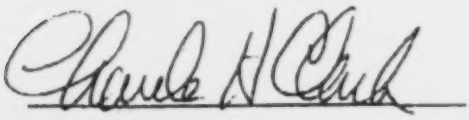
A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

## QUESTION PRESENTED FOR REVIEW

Whether a judicial pronouncement that unconstitutional conditions of confinement in a county jail were remedied by the commencement of a 42 U.S.C. § 1983 class action against a county government and officials— unaccompanied by a judgment, consent decree, or settlement from any defendant—is a "material change in the legal relationship" between the prisoner class and county sufficient to confer prevailing party status on the class for purposes of a 42 U.S.C. § 1988 attorney's fee application.

Respectfully submitted,

CHARLES H. CLARK, P.C.



Charles H. Clark
Bar I. D. No. 04274000
P.O. Box 98
604 Woldert
Tyler, Texas 75710
903/593-2514

ATTORNEY FOR PETITIONERS

## LIST OF PARTIES

1. Wood County, Texas, Petitioner

2. Sheriff Frank White, Petitioner

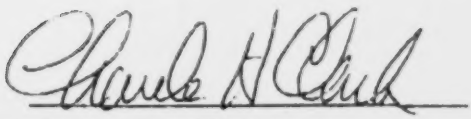
3. Deputy James Roberts, Petitioner

4. Larry Pembroke and a class of all persons incarcerated in the Wood County Jail from December 19, 1985, Respondents

6. Timothy Garrigan, Counsel for Respondents Stuckey & Garrigan

Respectfully submitted,

CHARLES H. CLARK, P.C.



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Bar I. D. No. 04274000
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Tyler, Texas 75710
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ATTORNEY FOR PETITIONERS

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IN THE

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WOOD COUNTY, TEXAS,
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PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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## REFERENCE TO OPINIONS

The official reference to the decision of the United States Court of Appeals for the Fifth Circuit is *Pembroke v. Wood County, Texas,* 981 F.2d 225 (5th Cir. 1993). The United States District Court for the Eastern District of Texas did not render an opinion. That Court's Findings of Fact and Conclusions of Law appear in Appendix B, and its Judgment appears in Appendix C. That Court's Order denying Plaintiffs' Motion for Attorneys Fees appears in Appendix D.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment to be reviewed is an opinion of the United States Court of Appeals for the Fifth Circuit entered on January 20, 1993. The Supreme Court has jurisdiction 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

This case involves the proper application of 42 U.S.C. § 1988, the full text of which is set forth verbatim in the Appendix E.

## STATEMENT OF THE CASE

### (i) Basis of Federal Jurisdiction

This is a Petition to the United States Supreme Court requesting issuance of a Writ of Certiorari to review a Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on January 20, 1993. Said Judgment and Opinion reversed, in part, a judgment of the United States District Court for the Eastern District of Texas, which as the court of first instance, properly exercised its jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201.

### (ii) Course of Procedings and Disposition of the Court Below

In December, 1985, Dennis McKeever and Trent Commander, individually, and on behalf of others similarly situated, instituted an action under 42 U.S.C. § 1983 against Wood County, Texas, Sheriff Frank White, and Deputy James Roberts. The action sought monetary damages, actual and punitive, declaratory and injunctive

relief. Plaintiffs complained of numerous conditions of confinement in the Wood County Jail, alleging violations of the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs also alleged violations of state law governing jail standards.

The district court certified a class of prisoners. The case proceeded to trial in February, 1988. Commander's individual claims were dismissed due to his failure to appear at docket call. McKeever's individual claims proceeded to jury trial. Class damage claims were waived and class claims for injunctive and declaratory relief were tried to the court.

The jury returned a verdict for the defendants on McKeever's individual claims. Upon receipt of the jury verdict, the district court denied all relief to the class. Judgment was entered in favor of all defendants.

On appeal, the United States Court of Appeals for the Fifth Circuit vacated the judgment of the district court. The Court of Appeals remanded for entry of findings of fact and conclusions of law on the class claims.

In October, 1991, the district court denied all class relief, decertified the class, and entered final judgment in favor of the defendants. The class applied to the district court for an award of attorney's fees. The district court denied the requests for attorney's fees. The class appealed both the denial of relief on the merits and the denial of attorney's fees to the United States Court of Appeals for the Fifth Circuit. The appeals were consolidated. In January, 1993, the Court of Appeals affirmed in part and reversed and remanded in part.

The district court's denial of relief on the merits was

affirmed. However, the Court of Appeals reversed the district court's finding that the class was not a prevailing party, and thus, reversed the denial of attorneys fees. The Court of Appeals remanded for an award of attorney's and costs to the class. The issue of the amount of a reasonable attorney's fee is now before the district court. Petitioners seek this Court's consideration of whether the class is a prevailing party and whether it is entitled to an award of attorney's fees *vel non.*

(iii) **Statement of Facts**

The facts giving rise to this litigation can be summarized briefly. In December, 1985, two individuals and a class of prisoners confined in the Wood County Jail commenced an action under 42 U.S.C. § 1983 against Wood County, Texas, Sheriff Frank White and Deputy James Roberts. All plaintiffs made numerous complaints concerning the conditions of confinement in the Wood County Jail and sought actual and punitive damages, declaratory and injunctive relief. In addition, the class sought the appointment of a receiver or special master to monitor jail operations. The prisoners' complaints addressed a broad spectrum of conditions and conduct, including general conditions of confinement, improper classification, poor jail administration, unsanitary cells, inadequately lighted facilities, inadequate medical and dental treatment, limited access to telephones and reading materials, overly restrictive visitation policies, improper mail handling, denial of access to the courts, and summary punishment of prisoners without due process of law.

Wood County is a small, rural East Texas county. During the 1980's, demographic projections indicated that the jail facility would be inadequate. In 1983, a citizens' advisory board was appointed by the county commissioners

at the request of the county judge to examine the needs of the county. During 1984, an inspector for the Texas Commission on Jail Standards advised county officials that the jail facility would soon require an increase in population capacity to allow proper classification of inmates. The county purchased land for construction of a new jail facility in May, 1985. Construction of a new facility commenced and the new Wood County Correctional Facility was occupied in 1988.

In addition to changes in the physical facility, changes in policy were initiated. As early as 1985, an inspector for the Texas Commission on Jail Standards recommended the hiring of a jail administrator to assist in the transition from the old jail facility to the new facility. In January of 1987, the county employed a jail administrator. During her tenure as the chief administrative officer, she updated and upgraded jail procedures and policies regarding the care and treatment of persons in custody in the Wood County Jail.

In February, 1988, the damage claims of McKeever and the equitable claims of the class came to trial. During the presentation of the court's charge to the jury, the district court opined that regarding access to the courts, punitive isolation and classification, defendants' conduct fell below a constitutional minimum. However, with regard to all other challenged conditions of confinement, the district judge stated that the defendants had either satisfied constitutional requirements or that questions of fact remained for jury consideration. The district court instructed the jury to determine whether plaintiff had been unconstitutionally confined from a totality of the circumstances. The jury returned a verdict for the defendants. Based upon the jury's verdict the district court denied all relief to the class. Judgment was entered for

defendants and the jury's verdict was not appealed.

However, the class did appeal the denial of declaratory relief. The Court of Appeals vacated the judgment of the district court and remanded for findings of fact and conclusions of law. The district court entered findings of fact and conclusions of law and again denied all relief to the class. The district court also denied prevailing party statuts to the class for purposes of a § 1988 attorney's fee request.

The Court of Appeals for the Fifth Circuit affirmed the district court's judgment on the merits. The Court of Appeals reversed the fact finding and determined *de novo* that the plaintiff class was entitled to prevailing party status because the favorable changes in policy at the Wood County Jail were implemented after suit was filed and prior to the trial of the case. The Court of Appeals held that these favorable changes were caused by the prisoners' lawsuit and thus they were entitled to prevailing party status.

***QUESTION PRESENTED:***

**Whether a judicial pronouncement that unconstitutional conditions of confinement in a county jail were remedied by the commencement of a 42 U.S.C. § 1983 class action against a county government and officials—unaccompanied by a judgment, conscent decree, or settlement from any defendant—is a "material change in the legal relationship" between the prisoner class and county sufficient to confer prevailing party status on the class for purposes of a 42 U.S.C. § 1988 attorney's fee application.**

## REASONS FOR GRANTING CERTIORARI

Petitioners are aware that review by Writ of Cer-

tiorari is not a matter of right, but of judicial discretion, and is granted only when special or important reasons require. This case is important and requires Supreme Court attention for three reasons. First, it provides the court an opportunity to revisit and further define the minimum or threshold level of success necessary for a civil rights plaintiff to attain prevailing party status for purposes of 42 U.S.C. § 1988 fee application. Second, it provides the Court an opportunity to announce whether the "catalyst test" has vitality in § 1988 jurisprudence. This important question of federal law has been affirmatively decided by numerous Courts of Appeal but has not been and should be decided by the Supreme Court. Finally, Petitioners are of the opinion that the Court of Appeals for the Fifth Circuit has, in this case, granted prevailing party status to the class in conflict with the applicable decision of this Court, specifically, *Estate of Farrar v. Hobby*, — U.S. —, 135 S.Ct. 566, — L.Ed.2d — (1992).

## ARGUMENT

### A.

Title 42 U.S.C. § 1988 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a party who fails to obtain either an enforceable judgment on the merits of any claim or comparable relief through either a consent decree or settlement is a prevailing party for purposes of a fee request. Plaintiffs were granted prevailing party status by the Court of Appeals based upon that Court's determination that certain challenged conditions of confinement improved at the Wood County Jail subsequent to the filing of the instant lawsuit and that defendant failed to show these improvements to be a gratuitous response. *Pembroke*

*v. Wood County, Texas*, 981 F.2d 225 (5th Cir. 1993).

The rationale for prevailing party status that was urged by the class and accepted by the Court of Appeals for the Fifth Circuit was based upon *Associated Builders and Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374 (5th Cir. 1990). In *Associated Builders*, the Fifth Circuit held that a plaintiff may claim prevailing party status in the absence of a judgment if two elements are established *prima facie*: "(1) that the goal of the lawsuit was achieved, and (2) that the suit itself caused the defendants to remedy the [complained of conditions]". *Id.* at 378 (citing *Hennigan v. Quachita Parish School Bd.*, 749 F.2d 1148, 1155 (5th Cir. 1985)). If established, a defendant bears the burden of showing its conduct to be a "wholly gratuitous" response. *Id.* Other circuits have also recognized some formulation of this "catalyst test" to confer prevailing party status in the absence of a judgment. *See Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Harrington v. DeVito*, 656 F.2d 264 (7th Cir. 1981); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980); *Rock Creek Limited Partnership v. State Water Resources Board*, 972 F.2d 274 (9th Cir. 1992); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990); *but c.f. Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049, 107 S.Ct. 2180, 95 L.Ed.2d 836 (1987).

This Court has refined the definition of prevailing party in four recent cases. *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (*per curiam*); *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); and *Estate of Farrar v. Hobby*, —U.S. —, 113

S.Ct. 566, — L.Ed.2d — (1992).

Certain Courts of Appeals have addressed the issue of whether a plaintiff may prevail for purposes of a § 1988 fee request in the absence of judicial relief. The Court of Appeals for the First Circuit has recognized a dichotomy where a Plaintiff may prevail for purposes of a § 1988 fee request request under one of two theories. *See e.g. Langston v. Johnson*, 928 F.2d 1206 (1st Cir. 1991) (discussion of "merits test" and "catalyst test"). The "merits test" derives from *Garland* and permits the award of § 1988 fees if a plaintiff "succeeds on a significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Garland*, 489 U.S. at 789, 109 S.Ct. at 1491-92. Courts of Appeals have applied the "catalyst test" to "plaintiffs who have succeeded in achieving favorable results because of the filing of their § 1983 claim, but have not had a final judgment on the merits entered in their favor." *See also Nadeau*, 581 F.2d at 278-79 (1st Cir. 1978). In *Garland*, this Court "synthesized the teachings of *Hewitt* and *Rhodes*," to formulate the current prevailing party analysis. *Farrar, — U.S. —, 113 S.Ct., at 572. Farrar* specifically embraces the concept that a prevailing party must have obtained some relief on the merits. *Id.* at 573. The Supreme Court has yet to address what circumstances, if any, would allow a plaintiff to prevail under the "catalyst test", *Hewitt*, 482 U.S., at 763; 107 S.Ct., at 2677.

Supreme Court jurisprudence has established that the settlement of a case will not preclude an award of fees, *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), and that an award of fees may be made short of a full litigation of the issues and a judicial determination in plaintiff's favor, *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)(consent decree).

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), this Court announced "the proper standard for determining whether a party has 'prevailed' in an action brought under certain civil rights statutes such that the party is eligible for an award of attorney's fees" under 42 U.S.C. § 1988.

*Garland* established the minimum level of success as follows:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. *Nadeau*, 581 F.2d, at 278-279. The floor in this regard is provided by our decision in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). As we noted there, "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.*, at 760, 107 S.Ct., at 2675. Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. *Id.*, at 7600-761, 107 S.Ct., at 2675-2676; *Rhodes v. Stewart*, 488 U.S. 1, 3-4, 109 S.Ct. 202, 203-204, 102 L.Ed.2d 1 (1988). Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status.

*Id.*, at 791, 792; 109 S.Ct. at 1493.

This Court in *Estate of Farrar v. Hobby*, — U.S. —, 113 S.Ct. 566, 574, — L.Ed.2d — (1992), was again called upon to address the level of victory necessary to qualify as a prevailing party. This Court held that a judgment for nominal damages was sufficient. *Farrar* reiterates that to qualify as a prevailing party "a civil rights plaintiff must obtain at least some relief on the merits of his claim. *Id.*, — U.S. —, 113 S.Ct. at 573. The Court delineated specific relief, such as "obtain[ing] an enforceable judgment or comparable relief through a consent decree or settlement." *Id.* (citations omitted). This Court stated that "[o]nly under these circumstances" can the civil rights litigation effect "the material alteration of the legal relationship of the parties." *Id.* To emphasize the necessity of a change in the legal relationship between the parties, *Farrar* states that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.*, at —, 113 S.Ct., at 574.

B.

Applying these principles to the instant case, it is clear that plaintiffs are not prevailing parties under Supreme Court formulations. Neither of the individual plaintiffs received any relief on the merits. One case was dismissed and the other resulted in a defense jury verdict. Likewise, neither the district court nor the Court of Appeals has granted the class any requested relief on the merits that altered the "legal relationship" between the class and the defendants. The class abandoned claims for damages in the district court, and both injunctive and declaratory relief were denied by the district court and the Court of Appeals. No judgment has ever been entered in favor of the class. No equitable decree has ever been entered in favor of the class. Neither settlement nor consent decree pertains to any defendant.

To the contrary, the only measure of success from a judicial source is a favorable statement of law concerning certain conditions of confinement contained in the trial court's jury charge. This statement was not reduced to judgment or decree in any form and did not form the basis of any relief to the plaintiff class. *Farrar* clearly states that such a pronouncement, unaccompanied by any relief on the merits, will not confer prevailing party status on a civil rights plaintiff. *Farrar,* U.S. at —, 113 S.Ct., at 573-74.

Plaintiffs' claim for prevailing party status rests solely upon the viability of *Associated Builders, supra,* and its formulation of the "catalyst test." Petitioners contend that the grant of prevailing party status under *Associated Builders* is inconsistent with *Farrar.* In support of its adherence to *Associated Builders,* the Court of Appeals *sua sponte* addressed and distinguished *Farrar. See Pembroke,* 981 F.2d at 231, note 27. The Court of Appeals acknowledged that a plaintiff prevails in his claim when he obtains "actual relief on the merits of his claim that materially alters the legal relationship between the parties..." *Id. quoting Farrar* at —, 113 S.Ct. at 573. Petitioners agree that this is the proper legal standard. However, the Court of Appeals concluded that "[u]nlike *Farrar,* changes in the legal relationship between the Plaintiffs and Defendants in this case were wrought by the bringing of the litigation itself, not with recovery of monetary damages. Thus, although the Plaintiffs received no monetary award, they are still entitled to an award of reasonable attorneys' fees." *Pembroke,* 981 F.2d 231, note 27. Petitioners contend that the Court of Appeals' distinction misapplies *Farrar.*

The Fifth Circuit's distinction between *Farrar* and the instant case was premised upon the differences in relief sought. *Farrar* sought millions in actual damages and

received a judgment for $1.00 in nominal damages. Plaintiffs in this case abandoned damage claims and sought only prospective remedies. *Id.* Applicants respectfully urge that the Court of Appeals was dissuaded from applying *Farrar* by a distinction that is immaterial to the resolution of the prevailing party issue. The *ratio decidendi* of *Farrar* is not restricted to cases in which a plaintiff seeks monetary damages versus some other form of affirmative relief. The fact that *Farrar* sought millions and received a single dollar does not alter the fact that an enforceable judgment was secured. Notwithstanding Farrar's minimal recovery against the defendant, the plaintiff prevailed nonetheless because an enforceable judgment was obtained. *Farrar, —, 113 S.Ct. at, 574.* This Court stated that the "'technical'" nature of nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988." *Id.*

The Court of Appeals for the Fifth Circuit erred in misapplying *Farrar* and by finding a change in the "legal relationship" between the parties was brought about by the litigation itself. Even accepting *arguendo* the Court of Appeals' determination that the lawsuit caused changes in jail policy, it does not follow that these changes affected a material change in the legal relationship between the parties. For as *Farrar* makes clear, the touchstone of a changed legal relationship does not occur "until the Plaintiff becomes entitled to enforce a judgment, consent, decree or settlement against the Defendant." *Id.* —, 113 S.Ct. at, 574. In this case, over seven years after the commencement of litigation, no plaintiff is entitled to enforce a judgment, consent, degree, or settlement against any defendant.

Under *Associated Builders,* and other cases applying a formulation of the "catalyst test", a plaintiff may prevail without altering the "legal relationship" between the par-

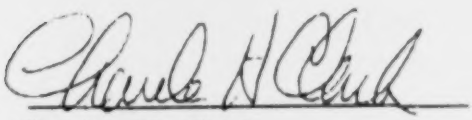
ties as contemplated by *Garland* and *Farrar*. The instant case is an instructive example of this proposition. The only measure of victory that the plaintiff class can claim is a federal court's pronouncement that prior to commencement of this lawsuit certain conditions of confinement in the Wood County Jail were below a constitutional minimum, and by the time of trial in 1988, these substandard conditions had been rectified. As this Court stated in *Farrar*, "a judicial pronouncement that defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Id.* —, 113 S.Ct., at 573.

## CONCLUSION

The Court of Appeals' reliance on *Associated Builders* allows plaintiffs to achieve prevailing party status, even though their level of success on the merits falls below the threshold articulated in *Garland* and *Farrar*. Petitioners respectfully request that the Supreme Court order the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES H. CLARK, P.C.



Charles H. Clark
Bar I. D. No. 04274000
P.O. Box 98
604 Woldert
Tyler, Texas 75710
903/593-2514
ATTORNEY FOR PETITIONERS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4079
& 92-4250

FILED
JAN 20 1993

D.C.. DOCKET No. 6:85-CV-475

LARRY PEMBROKE, ET AL.,
Plaintiffs-Appellants,

versus

WOOD COUNTY, TEXAS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Texas

Before POLITZ, Chief Judge, and WISDOM and WIENER, Circuit Judges.

**J U D G M E N T**

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the district court's denial of declaratory relief in this cause is affirmed; the district court's denial of prevailing party status is reversed and the cause is remanded to the district court to award the plaintiffs reasonable attorney's fees and costs.

January 20, 1993

ISSUED AS MANDATE: FEB 11 1993

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Illegible
Deputy

New Orleans, Louisiana FEB 11 1993

Larry PEMBROKE, et al.,
Plaintiffs-Appellants,

v.

WOOD COUNTY, TEXAS, et al.,
Defendants-Appellees.

Nos. 92-4079, 92-4250.

United States Court of Appeals,
Fifth Circuit.

Jan. 20, 1993.

Prisoners at county jail brought civil rights action for defendants' alleged violation of their constitutional rights. The United States District Court for the Eastern District of Texas, Robert M. Parker, Chief Judge, entered judgment denying prisoners' claims, and prisoners appealed. The Court of Appeals, 880 F.2d 411, vacated and remanded for entry of findings of fact and conclusions of law. Upon remand, the District Court entered findings, once again denied prisoners' claims, and denied prisoner's request for prevailing party status and reasonable attorney fees and costs. Appeal was taken. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) prisoners were not entitled to declaratory relief, absent showing that conditions complained of might reappear in future; (2) prisoners could not be placed in punitive isolation without due process protections; and (3) prisoners were "prevailing parties" entitled to award of attorney fees, notwithstanding their failure to obtain any declaratory or monetary relief.

Affirmed in part, and reversed and remanded in part.

Appeal from the United States District Court For the Eastern District of Texas.

Before POLITZ, Chief Judge, and WISDOM and WIENER, Circuit Judges.

WISDOM, Circuit Judge:

Two prisoners filed an action under 42 U.S.C. § 1983 alleging denial of access to the courts, improper classification of prisoners, punitive isolation without due process, improper restriction of reading materials, inadequate medical care, and additional generally unacceptable prison conditions. The district court certified a class of all present and future inmates. The individual prisoners' claims were tried to a jury while the class claims were simultaneously tried to the court. After the jury rendered a verdict for the state denying the individual prisoners any recovery, the court denied the class claims as well. The plaintiff class appealed this decision and in an unpublished opinion this Court vacated the district court's decision and remanded the case for entry of finding of fact and conclusions of law.[1] Upon remand the court entered its findings and once again denied the class claims. In a later proceeding, the court denied the plaintiff's request for prevailing party status and reasonable attorney's fees and costs.We affirm in part, reverse in part, and remand with instructions to award reasonable attorney's fees and costs to the plaintiffs.

I

This suit was originally instituted by Wood County Jail prisoners Dennis McKeever and Trent Commander. The suit was filed in December 1985 under 42 U.S.C. § 1983

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[1] *Pembroke v. Wood Country*, 880 F.2d 411 (5th Cir. 1989).

alleging that the conditions at the prison violated their constitutional rights.[2] The plaintiffs sought damages individually and sought declaratory and injunctive relief on behalf of the entire class of inmates. The district court certified a class of all present and future inmates confined and to be confined in the Wood County Jail. The class waived its damages claim and proceeded to trial seeking only declaratory and injunctive relief.

The conditions at the Wood County Jail at the time suit was filed in 1985 were indeed substandard. According to the district court's factual findings, the classification system was not properly implamented. As a result, pretrial detainees were not separated from convicted felons. In addition, the court found that "reading materials" consisted of one bible and class members were denied access to the county law library for a period of seven months. Finally the court found that one of the named plaintiffs had been placed in isolation for punitive purposes without due process protections.

These were not the only problems at the jail. The facility was in a general state of disarray. Administration of the facility had been delegated to untrained staff members; repeated state standards violations were never recorded or addressed; medical attention was erratic; and the plumbing was in a constant state of disrepair resulting in raw sewage overflowing the showers and toilets for months at a time. The jail was always in semi-darkness in violation of state lighting standards. Visitation privileges were arbitrarily restricted. The prisoners were sometimes sprayed with mace as a form of punishment.

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[2] Specifically, the complaint alleged that the conditions at the jail violated rights guaranteed by the First, Fourth, Eight, and Fourteenth Amendments to the United States Constitution.

By the time the case came to trial in February 1988, most if not all of the complained of conditions had been remedied. A prison administrator, hired in January 1987 two years *after* the suit was filed, instituted a total reform of the facility. The prisoners were properly classified, given access to the county law library and reading materials, proper procedural safeguards were instituted regarding the use of punitive isolation, and the other conditions complained of were corrected. In addition, the county began the construction of a new prison facility. The prisoners were moved to this facility and the old jail was closed in 1988 after the trial. Of the two original individual plaintiffs, only McKeever showed up for trial. McKeever's claims were tried to a jury while the class claims were tried simultaneously to the court. The court submitted McKeever's individual claims to the jury by a general charge, keeping the class claims for declaratory relief under advisement pending the jury's verdict.

The court instructed the jury to find for McKeever only if it determined that, under the totality of the circumstances, the plaintiff had been unconstitutionally confined in the jail. After the charge was made, and during the time allotted for counsel to object to the charge, the trial judge clarified his charge to facilitate review by this Court. He stated in his charge to the jury that "[t]he court has found on the points concerning the legal material, concerning the matter of reason for the single cell isolation ... [a]nd concerning classification ... reasonable minds could not differ that under the facts of this case, the facts constituted a violation of minimum constitutional standards".[3] In spite of these instructions, the jury returned a verdict in favor of the defendants. This verdict is not the subject of this appeal, because the individual claims were abandoned

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[3] Record on Appeal, vol. 4, p. 658.

by McKeever, who is now deceased. Mr. Pembroke was substituted as the class representative.

In the light of the jury's verdict, the court decided the class claims in favor of the defendants without stating any factual findings or conclusions of law. The plaintiffs[4] appealed this decision. In an unpublished opinion, this Court vacated and remanded for entry of findings of fact and conclusions of law.[5] Upon remand, the court issued its factual findings and conclusions of law and once again denied the class claims. The court then dismissed the case with prejudice and ordered that the class be decertified. The plaintiffs appealed this decision. In addition, in a later proceeding, the court denied the plaintiffs' request for prevailing party status, thus denying their request for reasonable attorney's fees and costs. The plaintiffs appeal this decision as well. The two appeals were consolated and this appeal followed.

II

[1,2] We review a district court's refusal to grant declaratory relief for abuse of discretion.[6] *In Hollis v. Itawamba, County Loans,* we stated that "[t]he issue of whether to grant a declaratory judgment is left to the district court's sound discretion to ensure that subsequent events have not ... made declaratory relief inappropriate".[7]

[3] The district court denied declaratory relief based

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[4] For convenience we sometimes use the term "plaintiffs" to refer to the plaintiffs in the class claim.

[5] *Pembroke v. Wood County,* 880 F.2d 411 (5th Cir.1989).

[6] *Torch, Inc. v. LeBlanc,* 947 F.2d 193, 194 (5th Cir. 1991); *Hollis v. Itawamba County Loans.* 657 F.2d 746, 750 (5th Cir.1981).

[7] *Hollis,* 657 F.2d at 750.

on its finding that the case was moot. The court found that because the jail conditions complained of by the plaintiff were remedied before the case came to trial they did not pose a continuing threat of harm to the class members. Further, based on what it characterized as "good attitudes" on the part of the defendants, the court also concluded that there was no threat that these types of conditions would arise in the future. Relying on *Golden v. Zwickler,*[8] *and United States v. W.T. Grant Co.,*[9] the court reasoned that because the problem was remedied before trial, some danger that the harm would be repeated must exist in order to warrant declaratory relief. In the absence of any such danger, the case is moot. We agree.

The plaintiffs argue that they are entitled to some relief upon the finding of *any* constitutional violation whether or not these conditions existed on the trial date or threaten to recur in the future. They rely on *Green v. Ferrell,*[10] where the Court remanded and suggested that declaratory relief would be an appropriate remedy for unconstitutional prison conditions. This case does not support their argument. In *Green,* the complained of conditions were still in existence when the case came to trial.[11] In addition, the plaintiffs also rely on *Morrow v. Harwell,*[12] arguing that even where the defendants demonstrate a willingness to comply with constitutional standards in the future, declaratory relief is still proper.

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[8] 394 U.S. 103, 108-09, 89 S.Ct. 956, 959-60, 22 L.Ed.2d 113 (1969).

[9] 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

[10] 801 F.2d 765 (5th Cir.1986) *rehearing denied* 807 F.2d 995 (5th Cir.1986).

[11] *Id.*

[12] 768 F.2d 619 (5th Cir.1985).

This case is distinguishable from the present case for the same reason we distinguished *Green*. Although the County changed some of its unconstitutional practices before the appeals was heard, they were still in existence when the case reached the magistrate.[13] The Court noted that declaratory relief would have been proper even had the conditions been remedied before the case was tried, yet it by no means held that such relief is required. Such a determination is left to the discretion of the trial court.

The proper standard for review is abuse of discretion. The record does not support a finding of abuse. The plaintiffs do not contend that any of the complained of conditions existed at the time the case came to trial. The plaintiffs argue that the defendants could easily return to their unconstitutional practices in the future. Yet, they offer no evidence to support this allegation. The district court described the defendants as having "good attitudes" and found no danger of the poor conditions recurring in the future. The fact finder is in the best position to judge the credibility of witnesses and we will reverse its finding only if it is clearly erroneous. The court's findings on this point are adequately supported by the record and are not clearly erroneous. We therefore affirm its determination that the case was moot and we agree with its decision to deny declaratory relief.

[4] Although we do not find error in the court's decision to deny declaratory relief we cannot turn a blind eye to the conditions at the Wood County Jail as they existed prior to the trial date. The district court found that McKeever was placed in isolation for five days for the purpose of punishment, without due process protections. The court made no finding that this was a class-wide problem;

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[13] *Id.* at 626-27.

however, the record reflects uncontroverted evidence that punitive isolation, without due process protections, was commonly used. The use of punitive isolation without affording due process is unacceptable and violates the 14th Amendment.[14]

[5] The court also found that class members were denied access to the county library for a period of seven (7) months. In its jury charge for McKeever's individual claim, the court stated that "on the points concerning the legal material ... reasonable minds could not differ that under the facts of this case, the facts constituted a violation of minimum constitutional standards".[15] We agree. Even if the court had not openly characterized this condition as a constitutional violation, it would still constitute a violation according to the precedent in this Circuit. *In Morrow v. Harwell*, this Court applied the Supreme Court's mandate that prisons supply "adequate law libraries or adequate assistance from persons trained in the law" in order to comply with the prisoner's constitional right to meaningful access to the courts.[16] The Court held that access to a weekly bookmobile coupled with circumscribed assistance from law students was insufficient.[17] Certainly no access to any library or any legal assistance violates the *Bounds* standard.

[6] Finally, the court found that the classification system was not fully utilized, before the filing of the

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[14] *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 2978, 41 L.Ed.2d 935 (1974).

[15] Record on Appeal, vol. 4, p. 658.

[16] *Morrow*, 768 F.2d at 622 (quoting *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.E.2d 72 (1977)).

[17] *Id.*

lawsuit in that pretrial detainees were not segregated from convicted felons. The court drew no legal conclusion from these facts in reference to the class claims; however, the court instructed the jury regarding McKeever's individual claim that the "classification [system] ... constituted a violation of minimum constitutional standards".[18] We agree. It is clear from the record and reflected in the district court's findings that there was absolutely no classification system in place when the suit was filed. Under *Jones v. Diamond*,[19] failure to adequately classify inmates is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

[7] The plaintiff class also complains of several additional conditions that existed in the jail when they filed suit.[20] Because they failed to raise these issues in their first appeal, we decline to discuss them at this time.[21] We do note, however, that the arbitrary restriction of reading materials to one bible without showing a need for such a restriction based on prison security is an unacceptable infringment on the prisoners First Amendment rights.[22]

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[18] Record on Appeal, vol. 4, p. 658.

[19] 636 F.2d 1364, 1374 (5th Cir.1981) (en banc), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), *overruled on other grounds, International Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174 (5th Cir.1986).

[20] The list of complaints included poor lighting, the presence of raw sewage for extended periods of time, inadequate medical and dental care, arbitrary restrictions on reading materials, arbitrary restrictions on visitation rights, and the use of mace as a punishment.

[21] *See Brooks v. United States*, 757 F.2d 734, 739 (5th Cir.1985).

[22] In *Green v. Ferrell*, this court held that a jail's prohibition on newspapers and magazines violated the First Amendment. 801 F.2d at 773. The Supreme Court has recognized a prison's right to infringe on its inmates First Amendment rights. Such infringement, however,

## III

[8] Plaintiffs contend that the district court erred in denying them prevailing party status. They argue the conditions of the Wood county Jail were improved as a result of their filing suit. This fact is undeniable. Under 42 U.S.C. § 1988 they should receive reasonable costs and attorney's fees.

[9] In *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board*,[23] this Court held that the plaintiff is entitled to prevailing party status if he establishes two elements: "(1) that the goal of the law suit was achieved, and (2) that the suit itself caused the defendant to remedy the [complained of conditions]". If the plaintiff can make this prima facie showing, the burden shifts to the defendant to show that its conduct was "wholly gratuitous".[24]

The plaintiffs contend that the purpose of their suit was to improve the conditions of confinement for members of the class. Conditions were improved by time of trial, but not until after the plaintiffs filed suit. The substantial improvements noted by the court meet this goal. The defendants counter, contending that the "goal" of the plaintiffs'

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(footnote 22 continued.)

must be "evaluated in light of the central objective of prison administration, safeguarding prison security". *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). The district court did not conduct such an evaluation; however, it noted that the jail officials said that reading materials were a fire hazard. Under *Green* and *Bell* this reason would not jusitfy the prison's infringement on the plaintiffs' constitutional rights.

[23]919 F.2d 374, 378 (5th Cir.1990).

[24]*Id.*

suit was nothing more than money damages or a declaration by the court that the plaintiff's constitutional rights had been violated. But the class waived any claims for money damages. The defendants would have us believe that the plaintiff class sought merely to have the court declare that their rights had been violated. We reject this argument. The prison conditions for persons confined in Wood County, Texas now pass constitutional muster. The goal of the suit has been accomplished.

[10] Next the plaintiffs must establish that the suit caused the defendants to remedy the prison conditions. Causation is a question of fact and "the district court's answer will stand on appeal unless clearly erroneous".[25]

The district court found that the plaintiffs' suit was not the cause of the improvements in the prison conditions. Although we give great deference to the district court's factual findings, we are "left with the definite and firm conviction that a mistake has been committed"[26] and reverse its finding on this point. The district court relied heavily on the timing of plans for the construction of the new prison in reaching its conclusion. It brushed over the undisputed fact that conditions at the *old* facility were improved drastically immediately following the filing of this suit. No evidence of prior plans to improve conditions at the old facility is in the record. The defendants argue that the improvements were merely incidental to the new administrator's presence. They argue that she was hired solely to aide in the transition from the old facility to the new

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[25] *Heath v. Brown*, 858 F.2d 1092, 1094 (5th Cir.1988) (quoting *Heath v. Brown*, 807 F.2d 1229, 1234 (5th Cir.1987)).

[26] *Heath*, 858 F.2d aat 1094 (quoting Campos v. City of Baytown, 840 F.2d 1240, 1243 (5th Cir.1988) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564- 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985))).

one and not to improve on the conditions at the old facility. That is a convenient argument, but the truth is that no corrective action was taken until the suit was filed.

Although the plans for a new prison existed before the plaintiffs filed suit, plans for improving of the old facility did not. Even if the primary purpose for hiring the new administrator was to aid in the transition to the new facility, this does not explain why she implemented such extensive reforms of the old facility. It is undisputed that unacceptable conditions in the old Wood County Jail were drastically improved immediately following the filing of this suit. The record supports the inescapable conclusions that these improvements were caused by the plaintiffs' filing suit. We are unwilling to characterize these improvements as mere coincidence.

The plaintiff's have met their burden under the *Associated Builders test.* The goal of their suit was accomplished as a result of their filing suit and the defendant has failed to show that the improvements were "wholly gratuitous". For this reason, the plaintiffs are entitled to prevailing party status. In accordance with the status, the plaintiffs should receive reasonable attorney's fees and costs.[27]

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[27] We are aware of the recent Supreme Court decision in Estate of Farrar v. Hobby, ___ U.S. ___, 113 S.Ct. 566, ___ L.Ed.2d ___ (1992). *Farrar* dealt with prevailing party status and the award of attorney's fees in the contex of nominal damages and is thus distinguishable from the present case. In *Farrar* the Supreme Court stated that to be entitled to attorney's fees, "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.... In short, a plaintiff "prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" *Id.* at ___, 113 S.Ct. at 573. The Court held that the plaintiff was not entitled to attorney's fees where he had received only a nominal award of one

We AFFIRM the district court's denial of declaratory relief. We REVERSE the district court's denial of prevailing party status and REMAND for the district court to award the plaintiffs reasonable attorney's fees and costs.

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(footnote 27 continued.)

dollar in spite of the fact that he was technically the prevailing party. *Farrar* is clearly distinguishable by the fact that its plaintiffs sought $17 million in compensatory damages whereas the plaintiffs in this case dismissed their damage claims early on and sought prospective remedies only. Unlike *Farrar*, changes in the legal relationship between the plaintiffs and defendants in this case were wrought by the bringing of the litigation itself, not with recovery of monetary damages. Thus, although the plaintiffs received no monetary award, they are still entitled to an award of reasonable attorney's fees.

B-1

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED
OCT 23 1991

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| LARRY PEMBROKE, et al | § | |
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| VS. | § | CIVIL ACTION |
| | § | NO. TY-85-475-CA |
| WOOD COUNTY, TEXAS, et al | § | |
| | § | |
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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 22-24, 1988, came on for trial before this Court the above entitled and numbered cause. The individual claims of Plaintiff Dennis McKeever were tried to a jury. The jury found unanimously for the Defendants and McKeever's individual claims were dismissed.

Prior to trial the court certified a Plaintiff class under Fed. R. Civ. P. 23(b)(2), whose claims were tried in the same trial. Whether the Defendants were liable on the class claims, and whether and how the court should award class relief were questions reserved for the court. Having considered the evidence and arguments of counsel, the court now enters these Findings of Fact and Conclusions of Law in conformity with Fed. R. Civ. P. 52(a).

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## FINDINGS OF FACT

1. This action seeks declaratory and injunctive relief on behalf of a class of prisoners incarcerated in the Wood County Jail. The class, certified by Order of this Court pursuant to Fed. R. Civ. P. 23(b) (2) includes present and future inmates in the Wood County Jail as of December 20, 1985.

2. Defendant Wood County, Texas is a unit of local government located within the Eastern District of Texas, Tyler Division.

3. Defendant Frank White was the elected Sheriff of Wood County. White commenced his term in January, 1985, and continued as Sheriff at all times relevant to this suit.

4. Sheriff White was responsible for making policy decisions for the county and for carrying out the policies and procedures for the county.

5. Dennis McKeever, the class representative at the time of trial was incarcerated in the Wood County Jail from October, 1985, through March, 1986.

6. Mr. McKeever died after the end of the trial, but prior to the entry of these findings of Fact and Conclusions of Law. Larry Pembroke was substituted as class representative by Order of this Court.

7. Wood County Jail facilities became obsolete in the early 70's through fault of Wood County.

8. Wood County renovated the jail in 1978-1979 in

an effort to provide an adequate jail facility for Wood County inmates.

9. The sanitary conditions at the jail, while not optimal, did not violate our common notions of decency.

10. The occasional overcrowding, which has occurred in the past, has been remedied by dedication of additional funds and employment of new jail management techniques such that the class is not harmed or endangered by Problems relating to overcrowding.

11. The Classification system was not utilized fully, prior to the filing of the lawsuit. The pretrial detainees were not segregated from convicted felons.

12. Mr. McKeever was placed in isolation for five days for the purpose of punishment, without due process protections.

13. Class members were provided access to telephones, limited visitation with their immediate family and adequate oopportunity for physical exercise.

14. The jail inspected incoming mail addressed to class members prior to the delivery of the mail to the addressee for the purpose of intercepting illicit materials.

15. The Defendants were not deliberately indifferent to known medical conditions of any member of the class.

16. Reading material available in jail was limited to one Bible. Mr. McKeever's request that family members be allowed to bring in newspapers or books was refused because jail officials said it was a fire hazard. After law suit was filed, other reading material was allowed in the jail.

17. Class members were denied access to the county law library for a period of seven (7) months. The class representative, Mr. McKeever, had access to the courts for both his criminal case and his § 1983 claim through representation by attorneys from the State and Federal bar. Class members were not and are not being denied access to courts.

18. Conditions relating specifically to classification of inmates, access to the law library and the punitive use of solitary confinement without due process were remedied prior to the trial of this case. There is no evidence before this court that these conditions have recurred. Further, there is no reasonable expectation that these conditions will recur in the future.

19. The jail conditions complained of by Mr. McKeever and found by the court to exist did not harm or pose any threat of harm to other class members at the time of trial or at any future time. The only person with a continued interest in pursuing declaratory judgment or other relief is the plaintiff's lawyer.

## CONCLUSIONS OF LAW

1. The Plaintiff class seeks declaratory relief from

the Defendants pursuant to 28 U.S.C. §2201, which provides in pertinent part:

"In a case of actual controversy within its jurisdictions, ... any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration."

2. Having found that Sheriff White was responsible for making and implementing policy decisions for Wood County, the Court concludes that Wood County is a proper party Defendant.

3. An Article III Court must satisfy itself that subject matter jurisdiction exists at all times during the litigation.

4. Voluntary cessation of allegedly illegal conduct does not deprive the Court of power to hear and determine the case, i.e., does not make the case moot. The case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. *U.S. vs. W. T. Grant Co.*, 345 U. S. 629, 73 S. Ct. 894 (1953).

5. Article III Courts do not render advisory opinions. Concrete legal issues, presented in actual cases, not abstractions, are requisite. This is as true of declaratory judgments as any other field. The question in each case is whether the facts alleged, under all the circumstances show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The existence of elements essential to relief when the action was initiated is not sufficient. All elements essential to relief

must exist at the time of the hearing including some danger that the wrong has caused harm to the Plaintiff class or will be repeated. *Golden vs. Zwickler,* 394 U. S. 104, 89 S. Ct. 956 (1969).

6. Concluding that there was no reasonable expectation that the wrongs which occurred in the past will be repeated, the Court finds nothing in this case warranting a declaratory judgment. *Armstrong vs. Ward,* 529 F. 2d 1132 (1976).

7. There was no real or immediate threat to Wood County jail inmates at the time of trial from Defendant's use of punitive isolation without due process. The court finds no reasonable expectation that Defendants will use punitive isolation without due process in the future. Therefore, the class claims on this issue are moot.

8. Plaintiff class is not entitled to declaratory or injunctive relief on the access to court claim because Wood County Jail personnel or policies did not impede the Plaintiff class' access to the court at the time of trial. There is no reasonable expectation that Plaintiff class will be denied access to courts in the future.

9. Taking into consideration the limitations of the physical facilities, and the steps taken to remedy the problems, Plaintiff class is not entitled to declaratory or injunctive relief on the issue of classification. Plaintiff class does not suffer a real or immediate threat of deprivation of rights concerning classification.

10. The totality of circumstances of conditions at

Wood County Jail do not amount to cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

11. Plaintiff class claims for declaratory and injunctive relief are denied.

12. Plaintiff class claims for declaratory and injunctive relief will be dismissed with prejudice. Fed. R. Civ. P. 12(b)(1).

13. Judgment shall enter accordingly.

SIGNED this 23rd day of October, 1991.

/s/ Robert M. Parker

ROBERT M. PARKER, CHIEF JUDGE

C-1

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED
OCT 23 1991

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| LARRY PEMBROKE, et al | § | |
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**FINAL JUDGMENT**

In accordance with the Findings of Fact and Conclusions of Law entered this day it is hereby ORDERED that Plaintiff class claims are denied and dismissed with prejudice. It is further ORDERED that the class is decertified.

SIGNED this 23rd day of October, 1991.

/s/ Robert M. Parker
ROBERT M. PARKER, CHIEF JUDGE

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D-1

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED
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| LARRY PEMBROKE, et al | § | |
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| WOOD COUNTY, TEXAS, | § | |
| et al | § | |

**ORDER**

Came on for consideration Plaintiffs' Motion for Attorney's Fees. After due consideration, the Court is of the opinion that the motion should be denied, for the following reasons:

First, the goals of the lawsuit as articulated in the Plaintiffs' complaint included an award of damages, declaratory judgment and injunctive relief for the Plaintiffs. The court's judgment denied and dismissed those causes of action.

Second, the Plaintiff now characterizes the goal of the lawsuit as an attempt to improve the conditions of confinement for Wood County, Texas jail inmates, and claims success because current conditions are better than conditions existing at the time this lawsuit was filed. The Court notes that Wood County had identified the fact that its jail facilities were inadequate and began plans for building a new jail before the lawsuit was filed. The construction of

new jail was completed after this lawsuit was filed. However, this lawsuit is not the catalyst that brought about the construction of the new Wood County jail.

Pursuant to 42 U.S.C. §1988, "The Court in its discretion may allow the prevailing party...a reasonable attorneys' fee as part of the costs." The Court denied all relief to the Plaintiff class and entered its findings of fact and conclusions of law on October 23, 1991. The Plaintiff timely filed objections, which were likewise denied. Based on those findings of fact and conclusions of law, the Court is of the opinion that Plaintiffs were not the prevailing party pursuant to 42 U.S.C. § 1988.

It is therefore, ORDERED that Plaintiffs' Motion for Attorney's Fees is DENIED.

SIGNED this 26th day of February, 1992.

/s/ Robert M. Parker

ROBERT M. PARKER, CHIEF JUDGE

# VERBATIM TEXT OF 42 U.S.C. § 1988

**§ 1988. Proceedings in vindication of civil rights; attorney's fees**

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981

or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

(As amended Nov. 21, 1991, P. L. 102-166, Title I, §§ 103, 113(a), 105 Stat. 1074, 1079.)